



TC02990

Appeal number: TC/2010/09178

*Excise Duty – duty suspended movement –irregularity - whether alcohol left
the UK – no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

A & R HAULAGE LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE NICHOLAS ALEKSANDER
 JAMES MIDGLEY**

Sitting in public at 45 Bedford Square, London WC1 on 22 April 2013

The Appellant failed to attend the hearing and was not represented, but the Tribunal proceeded with the hearing, being satisfied that reasonable steps had been taken to notify the Appellant of the hearing and that it was in the interests of justice to proceed.

Sabarit Singh, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal relates to the dispatch of three consignments of alcohol from
5 Edwards Beers and Minerals Ltd ("Edwards") in Leighton Buzzard on 26 January
2010, 27 January 2010 and 28 January 2010 for delivery to Les Vins Du Tunnel in
France.

2. HMRC say that the consignments did not leave the UK; the appellant that they
arrived at their destination. If the appellant can show that it is more likely than not
10 that the assignment did arrive it will succeed in this appeal.

3. The Appellants ("A&R") were originally represented by M&R Tax Advisers
Limited. However on 9 April 2013 M&R Tax Advisors Limited wrote to the Tribunal
stating that they were no longer instructed by A&R, and that all correspondence
should be sent directly to A&R. Following the hearing, HMRC forwarded to the
15 Tribunal a copy of an e-mail they had received from A&R on the day of the hearing
(but after the time the hearing commenced) stating that they had been unable to attend
the hearing because they were unable to afford the cost of representation by counsel.

4. A&R did not attend the hearing, but the Tribunal was satisfied that they had
been notified of the hearing and that it was in the interests of justice to proceed.

20 5. HMRC were represented by Mr Singh. He produced a bundle of documents and
correspondence in evidence. Included in the bundle were witness statements from
Lee Davis, a director of A&R, Joe Ciantar, head of security at P&O Ferries Ltd, and
Farshad Salili an officer of HMRC. We heard oral evidence from both Mr Ciantar
and Mr Salili

25 **The relevant law**

6. Alcoholic liquor produced in, or imported into, the UK becomes in principle
liable to excise duty when it is produced or imported. But the liability to pay the duty
is delayed and arises only at the "excise duty point". This is usually the point at which
the alcoholic liquor is released for consumption. But the duty point may be postponed
30 and the duty 'suspended' if the liquor is taken to an approved excise warehouse (a
"bonded warehouse"). The outline for the management of the duty was at the relevant
time provided for in Directive 92/12/EC.

7. Article 15 of that Directive provides for arrangements permitting the movement
of excise goods between tax warehouses. These are "duty suspended movements".
35 Article 15 and the UK regulations require that an intra-community movement of
excise goods be covered by guarantee provided by the warehouse keeper or the
transporter. Such movements of goods are required to be accompanied by an
"Authorised Administrative Document" (an "AAD") This is a form prescribed by the
Directive and regulations. It contains a number of boxes most of which must be filled
40 in by the consignor. Four copies are prepared: one of the consignor, one for the
consignee, one to be receipted by the consignee (and if required also by the fiscal

authorities of the destination state) and returned to the consignor, and the fourth for those fiscal authorities. All but the first copy must accompany the goods whilst in transit.

5 8. In this appeal the AADs for the movements in question were prepared by Edwards and specified the guarantor as A&R. They also provide in box 11, 'Other transport details' the registration number of the tractor unit, a trailer number and a seal number for the consignment. In every case the registration number of the tractor unit was AF02ARH. The trailer numbers were AR104 for the journey on 26 January 2010, AR103 for the journey on 27 January 2010 and AR102 for the journey on 28
10 January 2010.

9. The Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 provided for the occurrence of an excise duty point where there was an "irregularity" in the course of the duty suspended movement.

10. Regulation 3 provides:

15 "(1) This regulation applies where:

(a) excise goods are:

(i) subject to a duty suspended movement starting in the United Kingdom ...and

20 (b) in relation to those goods and that movement there is any irregularity which occurs or is detected in the United Kingdom.

(2) Where the Commissioners are satisfied that the irregularity occurred in United Kingdom, the excise duty point shall be the time of the occurrence of the irregularity or, where it is not possible to establish when the irregularity occurred, the time when the irregularity first comes to the attention of the Commissioners
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(3) Where it is not possible to establish in which member states the irregularity occurred, the excise duty point shall be the time of the detection of the irregularity or, where it is not possible to establish when the irregularity was detected, the time when the irregularity first comes the attention of the Commissioners.
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...

11. The regulations define "irregularity" to mean "an irregularity or offence within the meaning of Article 20 of the Directive. Article 20 is not particularly informative:

35 "1. Where an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties in accordance with article 15 (3), without prejudice to the bringing of criminal proceedings."

40 12. However it seems clear that a movement of excise goods so that they are released into free circulation when they should have been moving between warehouses under duty suspension arrangements is an irregularity. If alcohol destined

for France did not leave the UK there must have been an irregularity which occurred in the UK.

13. Regulation 7 provided:

5 "7. (1) Subject to paragraph (2) below, where there is an excise duty point as prescribed by regulation 3 ... above, the person liable to pay the excise duty on the occurrence that excise duty point shall be the person shown as the consignor on the accompanying administrative document or, if someone other than the consignor or is shown in
10 box 10 of that document as having arranged for the guarantee, that other person."

14. In this appeal A&R had arranged to give a guarantee and its name was in box 10. Thus if an excise duty point occurred A&R would be liable for the duty which had hitherto been suspended.

15. Sections 14 to 15F of the Finance Act 1994 provide that HMRC may be required to review certain decisions including certain decisions to assess excise duty. Section 16 permits an appeal in relation to such decisions of HMRC on review. Section 16 (6) provides:

20 "On an appeal under this section the burden of proof ... as to [certain matters not relevant to this appeal] shall lie upon the commissioners; but it shall otherwise be for the appellant to show the grounds on which any appeal is brought have been established."

16. By reason of section 16(6), the burden is on the appellant to show that the alcohol arrived at the warehouse in France. .

25 17. To summarise: if the goods do not arrive at the warehouse in France then there must have been an irregularity. If the irregularity occurred in the UK then a duty point arises and A&R is liable for the duty as guarantor. If it is not possible to determine where the irregularity occurred, a duty point nevertheless occurs and A&R is liable as guarantor.

Background Facts

30 18. On the basis of the evidence before us we find that the background facts are as follows:

35 19. A&R is in the business of national and international road haulage. According to Mr Davis's witness statement it currently operates a fleet of approximately ten tractor units and twenty trailers. In addition it utilises a small base of sub-contract haulage businesses which provides it with access to five or six additional tractor units when it is particularly busy.

20. On 18 January 2010, Mr Salili wrote to A&R imposing additional conditions in respect of the movement of duty suspended excise goods that its vehicles undertake under its movement guarantee. In particular A&R were required to notify HMRC by

fax or e-mail of any changes in the trailer or tractor units used to move excise goods in advance of the vehicle leaving the UK.

21. A&R sent HMRC pre-notifications that its tractor unit AF02ARH would be collecting alcohol from Edwards and would be delivering the alcohol to the warehouse of Les Vins du Tunnel in Calais in France using trailers AR104, AR103 and AR102 on 26 January 2010, 27 January 2010 and 28 January 2010 respectively. The Accompanying Administrative Documents (“AADs”) for the loads were consistent with this.

22. On 1 February 2010, Mr Salili received information that tractor unit AF02ARH had not travelled to France on those dates. Whilst the trailers AR104, AR103 and AR102 had travelled to France on 26, 27 and 28 January respectively, they were attached to tractor units GK020IB, YX05EWU and YX04HBG respectively, and were manifested on the ferry as empty.

23. On 9 February 2010 Mr Salili met Anthony Lucas, who was then a director of A&R. Mr Lucas told Mr Salili that there had been no “trailer swaps” in respect of any movements of excise goods between 26 January and 28 January 2010, or indeed in respect of any other past movements. Mr Salili discussed some 35 different movements with Mr Lucas. In relation to the movements which are the subject of this appeal, Mr Lucas reviewed A&R’s business records and confirmed that tractor unit AF02ARH had been swapped with tractor units GK02OJB on 26 January 2010, tractor unit YX05EWU on 27 January 2010 and tractor unit YX04HBG on 28 January 2010. Mr Lucas confirmed to Mr Salili that these were the tractor units that he claimed had transported alcohol from Edwards to France.

24. No notification of these tractor swaps had been given to HMRC, in breach of the additional condition attached to their movement guarantee by the letter of 18 January 2010. By a letter dated 2 March 2010, a civil penalty was imposed for the breach of the additional conditions, and this penalty has not been challenged by A&R.

25. Mr Salili wrote again to A&R on 3 June 2010 stating that his enquiries had established that empty loads had travelled with tractor units GK02OJB, YX05EWU and YX04HBG on 26, 27 and 28 January respectively, and that he intended to raise an assessment to recover the duty payable on the alcohol collected from Edwards.

26. In a letter dated 30 June 2010, M&R Tax Advisors, A&R’s representatives, stated that the account given by Mr Lucas at the meeting on 9 February was incorrect. In fact trailers AR104, AR103 and AR102 were transferred from tractor AF02ARH to different tractor units, and that trailers AR104, AR103 and AR102 had travelled laden to France with tractor units YX04HBG, FJ55HUA and YX03JWV by Eurotunnel on 26, 27 and 28 January 2010 respectively.

27. Mr Lucas resigned as a director of A&R on 20 December 2010. Mr Davis was appointed as a director on 18 November 2011, following the resignation of another director.

28. Mr Davis explains in his witness statement that tractor units and trailers may need to be exchanged for three reasons. The first is that drivers and their tractor units may need to be exchanged because regulations limit the number of hours that a driver can drive a heavy goods vehicle. Second, the operator's licence which applies to a specific tractor unit may limit its national or international usage. Finally, tractor units are approved for hauling up to a specified maximum weight. In consequence a change of tractor may be required on a trailer's return journey to reflect the goods being carried. Mr Davis also explained that trailers may often leave the UK empty because the UK is a net importer – and consequently it was often profitable for A&R to run tractors with empty trailers out of the UK, in order to collect a profitable return load (a “reload”).

29. In his witness statement, Mr Davis explains that Mr Lucas had made a mistake in his account because, given the limited time available at the meeting, he sought to respond to Mr Salili's enquiries as quickly as possible and only after a relatively cursory review of the business records. Mr Davis states that according to the business records available to him:

(1) Tractor unit AF02ARH collected the load in trailer AR104 on 26 January 2010. The tractor unit was exchanged for YX04HBG, which took the trailer to France on Eurotunnel.

(2) Tractor unit GK02OBJ travelled to France on 26 January 2010 unloaded, with a view to collecting a “reload”. A further exchange of tractor units occurred in France, so that vehicle GK02OBJ subsequently returned to the UK with trailer AR104.

(3) Tractor unit AF02ARH collected the load in trailer AR103 on 27 January 2010. The tractor unit was exchanged for FJ55HUA, which took the trailer to France on Eurotunnel.

(4) Tractor unit YX05EWU travelled to France unloaded with a view to collecting a reload. A further exchange of tractor units took place in France, so that YX05EWU returned with trailer AR103

(5) Tractor unit AF02ARH collected the load in trailer AR102 on 28 January 2010 was exchanged with tractor unit YX03JWY, which took the trailer to France on Eurotunnel. The trailer was unloaded, and tractor unit YX03JWY returned to the UK with trailer AR102 with a reload.

(6) Tractor unit YX04HB travelled to France unloaded with a view to collecting a reload.

30. Attached to Mr Davis's witness statements are copies of Eurotunnel transport documents showing that tractor YX04HBG travelled on 26 January 2010, tractor FI55HUA travelled on 27 January 2010 and tractor YX03JWV travelled on 28 January 2010. Neither the trailer numbers nor the weights of the vehicles are recorded.

31. Attached to Mr Davis's witness statement were copies of the CMR International Consignment Notes receipted by Les Vins du Tunnel, and indicating that the

consignment had been checked (as required by Art 19(2) of the Directive). Also attached to the witness statement were copies of “copy 3” of the AADs which A&R had obtained from Edwards. Mr Davis submits that these show that the movements had been properly discharged and that there had been no irregularities.

5 32. Mr Davis states that when he was appointed as a director, he found that A&R’s records were in a state of disarray. Mr Davis took steps to improve the company’s record keeping. However he has not been able to locate the tachographs for the relevant tractor units for the relevant dates.

10 33. We also had the benefit of a witness statement from Mr Joe Ciantar, head of security at P&O Ferries Ltd (“P&O”), and he also gave oral evidence.

15 34. Mr Ciantar told us that freight vehicles cannot be booked onto ferries in advance. They all operate on a “turn up and go” basis. The procedure adopted at Dover Eastern Docks is that the freight vehicle would first clear the UK and French border controls by producing passports for all of the drivers. Once the vehicle has cleared the border controls and security shed, it proceeds to a weigh bridge and is weighed. A ticket is produced showing the date, time and gross weight of the vehicle (being the combined weight of the tractor unit and trailer). The weight of the vehicle is required by P&O for the purposes of loading the ferry to maintain its stability.

20 35. The vehicle then proceeds to the P&O check-in booths, where the driver gives the clerk the weigh bridge ticket, his passport and documentation showing details of the load. These details are recorded by the clerk on P&O’s computer system. The clerk would check and record the registration number of the tractor unit and the trailer number. The clerk can check the tractor unit registration number using close circuit cameras. However the trailer number is not always visible on the camera. If the trailer number is written on the side of the trailer, it can be checked by the clerk. However, if it is not, then the driver would be asked by the clerk for the trailer number. The driver also declares whether the trailer is empty. P&O do not check the content of the trailer. Payment is collected from the driver either in cash or by card. Alternatively, the haulage company may have an account with P&O. and this is the most frequent method of payment.

30 36. Mr Ciantar told us that on the basis of the computer records maintained by P&O:

35 (a) On 26 January 2010 at 20:26 tractor GK02OJB and trailer 104 travelled from Dover to Calais with driver Hawkins Paul. The vehicle was recorded as being empty. The gross weight of the vehicle was 15,520kg. Mr Ciantar told us that this weight was consistent with an empty load.

40 (b) On 27 January 2010 at 19:45 tractor YX05EWU and trailer 103 travelled from Dover to Calais with driver K Williams. The vehicle was recorded as being empty. The gross weight was 15,440kg. Mr Ciantar told us that this weight was consistent with an empty load.

(c) On 28 January 2010 at 18:15 tractor YX04HBG and trailer AR102 travelled from Dover to Calais with driver A Cecil. The vehicle was recorded as being empty. The gross weight was 14,780kg. Again Mr Ciantar told us that this weight was consistent with an empty load.

5 37. A&R challenge Mr Ciantar's evidence. Mr Davis's evidence is that A&R book
ferry crossings in advance, and at the time of the booking, the registration number of
the tractor is provided, but not the number of the trailer. Mr Davis also states that at
the P&O check-in booths, the clerk may, or may not request the trailer number, they
may enter a trailer number which is a fabrication of their own, or the driver may
10 provide a trailer number which is incorrect. In support of this contention, Mr Davis
refers to P&O recording trailers 257, EA101 and 252 as being hauled by their tractor
units on crossings on 26 and 27 January 2010, and that at the relevant time A&R only
hauled its own trailers, and did not at the relevant time have trailer units with those
numbers. Mr Davis contends that this demonstrates that P&O's records are
15 unreliable. They should therefore not be relied upon in the case of the trailers that
were hauled by vehicles GK02OJB, YX05EWU and YX04HG on 26, 27 and 28
January 2010.

38. We have no hesitation in preferring the evidence of Mr Ciantar over that of Mr
Davis. We do so for the following reasons. First, Mr Davis in his witness statement
20 says that A&R's record keeping was in a considerable state of disarray and
disorganisation – and indeed this was the reason why the tachographs for the relevant
tractor units could not be traced. The considerable disarray and disorganisation of
A&R's business records would also mean that evidence based on A&R's business
records cannot be treated as wholly reliable.

25 39. Second, the evidence of Mr Ciantar is that where the trailer number is not
visible to the clerk (either because it is neither visible on the camera nor is painted on
the side of the trailer), it is the driver that provides the number. It is not plausible that
(if the numbers are visible to the clerk), the clerks would have got all three trailer
numbers wrong, or alternatively if the numbers were not visible, all three drivers
30 would get all three trailer numbers wrong - and in either case, the alleged wrong
trailer numbers given would coincidentally be those of the three trailers that A&R had
initially stated would travel laden and are listed on the relevant AADs.

40. Finally, the basis on which Mr Davis asserts that A&R did not use trailers 257,
EA101 and 252 in January 2010 is unclear. He was not appointed as a director until
35 November 2011, and it is unclear when he actually joined the company, or in what
capacity he is able to make the statement that A&R did not use these trailers on the
ferry crossings. From the notes of a meeting that Mr Salili had with Mr Lucas on 12
January 2010, we note that Mr Lucas stated that A&R owned 6 trailers (AR101-
AR106) and hired two more (AR107 and AR108).. Yet on 23 February 2010 tractor
40 YX04HBG collected a full load of beer from Edwards, but was later intercepted at
Dover with a different trailer (TR2116) containing forklift parts. This brings into
doubt the veracity of A&R's assertion that at the relevant times they used no trailer
other than those numbered AR101 to AR108.

41. Mr Davis also relies on the part 3 AADs and receipted CMRs to show that the alcohol was received at their intended destination in France. We had no evidence before us as to the procedures adopted by Les Vins du Tunnel as to the reliability of their systems and the accuracy of their receipts. In addition, Mr Salili stated in evidence that one of the mechanisms used to evade alcohol duty is to divert the duty suspended alcohol loaded from a UK excise warehouse somewhere in the UK before leaving empty for France. In France an identical load is borrowed, solely for the purpose of presenting the load to the destination warehouse to get the AADs discharged. The borrowed load is subsequently returned to the lender. The fraudster may then only have to bear the cost of French duty, which is far lower than the corresponding UK duty. Although fact the AAD procedure appears on its face to show that no irregularities have occurred, this is not necessarily the case. The same point applies to the CMRs that appear to have been receipted by the destination warehouse.
42. We find that trailers AR104, AR103 and AR102 were used to collect the alcohol from Edwards as specified on the AADs. We find that these trailers left the UK empty on the material dates. We therefore find that the alcohol must have been removed from the trailers whilst they were in the UK. We find that the receipts endorsed on the AADs and CMRs cannot be relied upon.
43. We find that A&R have not shown that it was more likely than not that the goods left the UK or arrived at Les Vins du Tunnel.

Conclusions

44. In this appeal A&R's grounds of appeal are that:
- (1) The original decision to impose the assessments for excise duty and VAT were unreasonable and not proportionate;
 - (2) There were no irregularities in the relevant three movements;
 - (3) Even if there were irregularities, then
 - (a) A&R had no knowledge of them, did not cause them, and cannot be held liable for the excise duty and VAT; and
 - (b) The irregularities did not take place in the UK
 - (4) As the VAT assessment is based on the excise duty assessment, as the excise duty assessment is invalid, so is the VAT assessment.
45. The failure of the alcohol to arrive at Les Vins du Tunnel was an irregularity. It was not possible to say it took place in France, therefore it is to be treated as taking place in the UK (and indeed we find that HMRC's submission that the alcohol did not leave the UK is proved). Thus an excise point arises in the UK.
46. A&R, being the guarantor of the delivery is liable for the duty. The fact that A&R may have had no knowledge of the irregularity or may not have caused them is irrelevant. It is liable by reason of being the guarantor.

47. In the circumstances, HMRC's decision to impose an assessment is reasonable. As the amount of the assessment represents the duty and VAT arising in respect of the goods in question, we find that the assessment is not disproportionate.

5 48. There was no dispute as to the amount of the duty. The assessment was therefore properly made.

49. We dismiss the appeal.

Costs

50. As stated above, A&R's representatives wrote to the Tribunal on 9 April 2013 stating that they were no longer instructed.

10 51. On the same date, HMRC e-mailed A&R asking for confirmation by midday on 10 April whether they intended to pursue the appeal. As no response had been received by the deadline (and A&R did not respond to telephone calls), HMRC had to assume that the hearing would go ahead. HMRC prepared the appeal bundles for the Tribunal. HMRC put A&R on notice that if it subsequently confirmed that was not
15 pursuing the appeal, HMRC would apply for its costs under Rule 10(b) of the Tribunal rules, as it would have been unnecessarily forced to prepare for the hearing.

52. In this context we note that A&R did not comply with the Tribunal's directions relating to the preparation of bundles or the provision of a skeleton argument.

20 53. A&R e-mailed HMRC on 22 April at 12:10pm (after the appeal hearing had commenced) stating that they could not afford to pay for representation at the hearing.

54. HMRC have applied for their costs under Rule 10(b) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009. This gives the Tribunal discretion to award costs against any party if they (or their representative) have acted unreasonably in bringing, defending or conducting the proceedings.

25 55. The Tribunal exercises its discretion to award costs in standard category appeal sparingly. In particular, it is only fair that unrepresented appellants (as was the case here after 9 April 2013) must be afforded a wide margin of latitude in the conduct of any appeal.

30 56. However, directions given by the Tribunal are there to be carried out, and failure by a party to comply with express directions without good reason is likely to amount to unreasonable conduct.

35 57. We are therefore minded to allow HMRC to make an application for costs, but only in respect of the reasonable costs necessarily incurred in the preparation of the bundles specified in Direction 7 of the agreed directions which were approved by the Tribunal on 11 October 2011. In relation to costs, we direct as follows:

- (1) In accordance with Rule 10(3), HMRC must deliver a written application together with a schedule of the costs claimed in sufficient detail to allow the

Tribunal to make a summary assessment of such costs if it so decides. Such application must be delivered to the Tribunal and to the Appellant no later than 28 days after the date on which this decision is released.

5 (2) The Appellant shall deliver to the Tribunal and to the Respondents a written statement of any representations that it may wish to make in respect of the application and schedule. Such statement shall be filed no later than 28 days after the date on which the application for costs is received by it.

10 58. The Tribunal shall then decide whether to proceed to make a summary assessment without the need for a further hearing, or whether further directions are necessary. Such decisions shall be made by a Tribunal Judge sitting alone.

Rights of Appeal

15 59. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

RELEASE DATE: 21 October 2013

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